Supreme Court, U.S.
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No. 01-77

IN THE
Supreme Court of the United States

MARY ANN HETREED,
Petitioner,

v.

ALLSTATE INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent states the following:

Allstate Insurance Company ("Allstate") states that it is an insurance carrier providing coverage in states nationwide. Allstate is a subsidiary of The Allstate Corporation. Allstate's subsidiaries include: Allstate Fire and Casualty Insurance Company, Allstate Holdings, LLC, Allstate Indemnity Company, Allstate Insurance Company of Canada, Allstate International Inc., Allstate Life Insurance Company, Allstate New Jersey Holdings, LLC, Allstate North American Insurance Company, Allstate Property and Casualty Insurance Company, Allstate Texas Lloyd's, Inc., General Underwriters Agency, Inc., The Northbrook Corp., and Ivantage Group, LLC.

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STATEMENT OF THE CASE

Petitioner Mary Ann Hetreed was employed by Respondent Allstate Insurance Company in its Audit Department from 1987 to 1997. In 1991, she began a four-year sexual relationship with George McGann, Petitioner's second line supervisor. During the course of their sexual relationship, McGann was promoted to the lowest level of vice president at Allstate, one of more than fifty. During that period, Petitioner also received evaluations, salary increases and a promotion, which she admits were deserved and recommended by (and could not have been approved without the support of) her direct supervisor, Dean Bahrman. Like all bonus-eligible employees, Petitioner's annual bonus was determined by Company and department performance.

In September 1995—four years after the sexual relationship began and more than three months after McGann retired from Allstate—Petitioner first reported their sexual relationship to Allstate management. Although she claimed that the relationship was not consensual, Petitioner's description of the events of their relationship indicated to the contrary (*e.g.*, Petitioner gave McGann a gift wrapped box of condoms, bought him "sex toys" from her catalog, and invited him into her home when her husband was out of town). There is no evidence that any person in management (other than Petitioner and McGann) was aware of their sexual relationship before September 1995.

In response to Petitioner's complaint, Allstate commenced an investigation the same day. Allstate did not conclude that Petitioner had been sexually harassed, but it did determine that McGann showed poor judgment by entering into a consensual sexual relationship with a subordinate. Because McGann had already retired, Allstate's only available sanction was to withhold payment of McGann's discretionary bonus in March 1996. Petitioner's suggestion that this sanction was minor or that Allstate could legally have withheld retirement benefits from McGann has no basis in the record.

In April 1996, Petitioner filed a complaint in federal court alleging *quid pro quo* sexual harassment and other claims. Petitioner claimed that for four years, she secretly submitted to sexual advances by McGann out of fear that he would use his authority to withhold deserved evaluations, raises and/or promotions. Following this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the district court granted summary judgment on Petitioner's sexual harassment claim and most of Petitioner's other claims. In its decision, the district court assumed that Petitioner had presented evidence of actionable sexual harassment, but found that her

alleged submission to McGann's sexual demands was not the kind of tangible employment action contemplated by this Court in *Ellerth* to impose strict vicarious liability on Allstate. Accordingly, the district court applied the affirmative defense established in *Ellerth* and *Faragher* and granted summary judgment to Allstate on the bases that: (1) Allstate had in place anti-harassment policies and a reporting mechanism of which Petitioner was aware; (2) there was no evidence beyond Petitioner's bald opinion that the reporting mechanism was not effective; (3) Allstate investigated Petitioner's complaint and took appropriate and effective action; and (4) it was objectively unreasonable for Petitioner to wait four years (and three months after McGann retired) to report the alleged harassment.

In February, 2000, following a trial on the two remaining retaliation claims, the district court entered judgment in Allstate's favor on all of Petitioner's claims. On March 27, 2000, Petitioner timely filed a Notice of Appeal of the order entering the jury verdict and the order granting summary judgment. Subsequently, on June 28, 2000, the district court announced its award of costs to Allstate and thereafter entered judgment on that award on November 9, 2000. Petitioner did not file a separate notice of appeal of the costs order or amend her earlier notice of appeal to include an appeal of the costs judgment.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be denied because the questions presented do not meet any of the criteria set forth in Supreme Court Rule 10 for granting review by this Court. The decisions below present neither a conflict among the circuit courts, nor a departure from the accepted and usual course of judicial proceedings. Indeed, Petitioner does not cite to a single case contrary to the decisions below. Instead, she asks this Court to review the lower court's fact-bound consideration on summary judgment

and its application of settled law to the facts in this case, in direct contravention of the standards for review set forth in Rule 10. In so doing, Petitioner substantially misstates the facts, taking advantage of this Court's rule not requiring specific citations to record evidence in the petition. Petitioner's arguments are unsupported by appropriate authority and do not present a suitable issue for review by this Court. Accordingly, her petition for a writ of certiorari should be denied.

RESPONDENT'S BRIEF IN OPPOSITION

I. PETITIONER'S SEXUAL HARASSMENT CLAIM (QUESTIONS 1 AND 2)

Petitioner presents two questions based upon the Seventh Circuit's determination that summary judgment was appropriate on her sexual harassment claim. Both questions address the same issue: whether the Seventh Circuit "committed serious legal error" by holding that Petitioner's alleged submission to sexual advances by a supervisor, based upon an alleged threat that he would withhold deserved job benefits, does not subject Allstate to strict, vicarious liability (Pet. 7, 9). Petitioner fails to demonstrate that there is any confusion in the lower courts about the application of the recently announced standard for review of sexual harassment claims set forth by this Court in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). She simply disputes the lower court's determination, under the peculiar facts of this case, that she failed to present evidence of a tangible employment action and failed to present a genuine issue of material fact to dispute Allstate's proof in support of its affirmative defense.

In *Ellerth* and *Faragher,* this Court eschewed the traditional *quid pro quo* and hostile environment analyses for claims arising under Title VII of sexual harassment by a supervisor in favor of a clearer standard for strict, vicarious

liability to the employer based solely upon whether the plaintiff can show a "tangible adverse employment action" "result[ing] from a refusal to submit to a supervisor's sexual demands." *Ellerth*, 524 U.S. at 753-754. In those cases where a plaintiff can show the requisite tangible employment action, the employer is held strictly liable. However, where the plaintiff can show actionable harassment, but no tangible employment action, the employer can assert an affirmative defense to liability based upon the following factors:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

(b) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

In creating this clearer "tangible employment action" standard, the Court disfavored imposing strict liability based upon ambiguous evidence of unrealized threats or an employee's secret submission to sexual demands. Thus, this Court expressly defined a "tangible employment action" as "requir[ing] an official act of the enterprise, a company act . . . [which] in most cases is documented in official company records, and may be subject to review by higher level supervisors." *Ellerth*, 524 U.S. at 762. The Court made clear that this standard should be construed consistent with the "material adverse employment action" standard applied to all other Title VII claims. *Ellerth*, 524 U.S. at 761. *See also Savino v. C.P. Hall Co.*, 199 F.3d 925, 932 n.8 (7th Cir. 1999); *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461 n.5 (6th Cir. 2000). Only "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a

decision causing a significant change in benefits"—each of which "in most cases inflicts direct economic harm"—meets this standard. *Ellerth*, 524 U.S. at 762.

Petitioner makes two arguments in support of her petition. First, she relies on a pre-*Ellerth* definition of *quid pro quo* sexual harassment to argue that the Seventh Circuit misapplied *Ellerth* and *Faragher* because those decisions "did not change the previous rule of strict liability for *quid pro quo* sexual harassment by a supervisor" (Pet. 10). Second, Petitioner argues that, to the extent *Ellerth* and *Faragher* did change the standard to require more than an unrealized threat of withholding job benefits, the lower court misapplied that standard because Petitioner's alleged submission to the sexual advances of her supervisor constitutes a tangible employment action (Pet. 11).

Petitioner's first contention is patently wrong because this Court in *Ellerth* expressly directed that "the categories quid pro quo and hostile work environment will [*not*] be controlling on the issue of vicarious liability. . . ." *Ellerth*, 524 U.S. at 745 (emphasis added). Similarly, Petitioner's second argument has no merit because no court has held that submission constitutes a tangible employment action. Only two circuit courts have discussed whether an employee's secret submission to the sexual demands of a supervisor constitutes a tangible employment action for the purposes of imposing strict liability under *Ellerth* and *Faragher*. Both rejected Petitioner's argument. The Seventh Circuit in this case held in an unpublished decision that sexual relations are not a "tangible employment action" under *Ellerth* and *Faragher*, noting that those cases "used that phrase to refer to wages, promotions, and other acts that may be viewed as official acts of *the employer* within the scope of Title VII (which deals with wages and other conditions of employment); a supervisor's sexual activity is not attributed to the firm unless it fails to take preventative or responsive steps

within its power." (Pet. App. A, page 4). The Tenth Circuit applied the same reasoning in rejecting a similar claim in its unpublished decision in *Coker v. Ball Janitor Service, Inc.*, 208 F.3d 225, 2000 WL305487 at *3-4 (10th Cir. March 24, 2000) (affirming summary judgment for employer on sexual harassment claim). *Accord Watkins* v. *Professional Security Bureau, Ltd.*, 1999 WL 1032614 at 3 (4th Cir. Nov. 15, 1999) (declining to find tangible employment action where plaintiff presented facts that she submitted to unwelcome sexual advances). Thus, there is no conflict among the circuit courts as to the standard for a "tangible employment action" for the purpose of applying the affirmative defense under *Ellerth* and *Faragher*.

Petitioner cites to no contrary precedent. Petitioner's only authority is a non-binding EEOC Guidance that disagrees with the balance struck by this Court in *Ellerth* and *Faragher* (Pet. 13). Petitioner cites to no case in which a court has adopted or followed the EEOC Guidelines, nor are such agency guidelines entitled to deference because they are contrary to the law. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (invalidating EEOC ADA regulations).

Although Petitioner did not present it as a separate question for consideration before this Court, she devotes significant attention in the petition to the lower court's determination that she failed to present a genuine issue of material fact on Allstate's affirmative defense. Petitioner does not contend that the lower court applied an incorrect standard or that its decision creates any conflict or ambiguity in the law. Instead, she asserts only that the lower court erred in its application of the settled law to the facts in this case (Pet. 7, 9). This Court need not get embroiled in a detailed analysis of the extensive factual record in this case because the very nature of Petitioner's challenge, *i.e.*, that the lower court made "erroneous factual findings," is precisely the kind of asserted error that Supreme Court Rule 10 rejects. Moreover, the factual dispute

asserted by Petitioner relates to whether she was reasonable in failing to complain about the alleged harassment because she feared retaliation. The lower court recognized that if Petitioner had presented specific evidence to support her alleged fear of retaliation, that could, under appropriate circumstances, preclude summary judgment on the second prong of the affirmative defense. But, it found that Petitioner presented no such evidence and granted summary judgment accordingly. Petitioner's request for review of this factual determination does not, therefore, present a substantial federal question warranting this Court's review.

II. PETITIONER'S FAILURE TO TIMELY APPEAL THE AWARD OF COSTS (QUESTION 3)

The Petition for a Writ of Certiorari on the Seventh Circuit's determination that it lacked jurisdiction to decide Petitioner's appeal of the judgment awarding costs to Allstate should be denied because the decision is consistent with the well-established interpretation of Rule 4 of the Federal Rules of Appellate Procedure. The Seventh Circuit and other circuit courts have consistently held that where, as here, a court enters a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure on the merits and subsequently enters a separate final judgment on the award of costs, the award of costs is separately appealable and "a separate notice of appeal is necessary . . . ." *Weilgos v. Commonwealth Edison Co.*, 892 F.2d 509, 511 (7th Cir. 1989). *See also Lentomuynti Oy v. Medivac, Inc.*, 997 F.2d 369, 367 (7th Cir. 1993). *Accord Barr v. Nat'l Conference of Bar Examiners*, 182 F.3d 931, 999, 1999 WL 317547 at * 4 (10th Cir. May 20, 1999) (appeal of costs judgment dismissed for lack of jurisdiction because Rule 4 of the Federal Rules of Appellate Procedure requires the appellant to file a separate notice of appeal to appeal the judgment on an award of costs entered after the original notice of appeal of the judgment on the merits).

Petitioner cites no authority contrary to the Seventh Circuit's decision below. She offers only her own interpretation, based in part on a misrepresentation of the holding in *Weilgos*, to argue that the costs judgment merges into the judgment on the merits for the purposes of filing a notice of appeal pursuant to Rule 4. To the contrary, the Seventh Circuit has unambiguously held for at least the past twelve years that the costs award does not merge into the judgment on the merits and that a separate notice of appeal must be filed. Thus, Petitioner's argument is contrary to the settled interpretation of the requirements of Rule 4. Because there is neither an ambiguity nor a conflict in the law, Petitioner's incorrect assertion that the lower court misapplied the settled law does not present an appropriate question for this Court's review.

CONCLUSION

Neither the questions presented nor the arguments made by Petitioner meet the standards set forth in Rule 10 for review by this Court. Petitioner cites to no conflict in the law or ambiguity among the lower courts that requires clarification. She instead asks this Court only to review the Seventh Circuit's application of the law to the specific facts of this case, which is not the function of this Court. Wherefore, Respondent Allstate Insurance Company respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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